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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAIME LOPEZ, Defendant and Appellant.	E048027 (Super.Ct.No. FSB702103) OPINION

APPEAL from the Superior Court of San Bernardino County. Cara D. Hutson, Judge. Affirmed with directions.

R. Clayton Seaman, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Christine Bergman, Kristen Kinnaird Chenelia, and Lynne G. McGinnis, Deputy Attorneys General, for

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts 2, 4 and 5.

Plaintiff and Respondent.

Defendant Jamie Lopez challenges his convictions for molesting his two step-daughters, N.E. and C.H. Defendant appeals judgment entered following jury convictions for two counts of the lesser-included offense of misdemeanor battery (Pen. Code, § 242[1]; counts 1 and 2) and three counts of committing a lewd act upon a child under the age of 14 (§ 288, subd. (a)[2]; counts 3, 4, and 5). The jury also found true the multiple victims enhancement as to counts 3 through 5. (§ 667.61, subds. (b), (c) & (e).)

Defendant contends the trial court erred in permitting the prosecutor to amend the information to add count 4. Defendant asserts that adding the new count was improper because there was no evidence presented at the preliminary examination supporting the additional offense. Defendant also contends the trial court erred in denying his motion for acquittal as to counts 3 and 4; erred in failing to instruct the jury on the requisite concurrence of act and intent in counts 3 and 4; and erred in precluding cross-examination of N.E. regarding her pregnancy and suicide attempt. As to these contentions, we conclude there was no reversible error and affirm the judgment.

Defendant further argues, and the People agree, the court erred in not giving defendant proper credit for pretrial custody served. The trial court erroneously subtracted 360 days custody credit, rather than 180 days, for counts 1 and 2, and failed to award

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[1] Unless otherwise noted, all statutory references are to the Penal Code.

[2] Section 288, subdivision (a), in effect at the time of commission of the charged offenses, is referred to herein as section 288(a).

defendant 97 days work time credit. Defendant was in continuous custody until his sentencing for 647 days. Accordingly, the trial court is directed to modify the judgment to reflect that defendant is entitled to 564 days of credit (744 days (647 + 97) – 180 days), rather than 324 days credit erroneously awarded by the court. The judgment is affirmed in all other respects.

1. Facts

Defendant and Michelle Lopez married in 1999. Defendant had two daughters of his own, B.L., and a younger daughter, A.L. (born 1990). Michelle also had two of her own daughters, C.H. (born in 1990) and N.E. (born in 1992). In 2001, a Wal-Mart employee notified the police that defendant had dropped off film at Wal-Mart to be developed. The film contained inappropriate photographs of naked girls in the shower, and photos of girls blindfolded, wearing lingerie.

Police Officer Mouwerik investigated the photographs. He took blowups of the photos to local elementary schools and determined that C.H. and N.E. were the girls in the photographs. Officer Mouwerik then went to defendant's apartment. Defendant and Michelle were not home. C.H. told Officer Mouwerik defendant had taken the pictures. When Officer Mouwerik returned 45 minutes later, B.L. was there with C.H. and N.E. B.L. told Officer Mouwerik she had taken the pictures.

When Officer Mouwerik returned a third time that same day, Michelle was home with C.H. and N.E. Officer Mouwerik showed Michelle the photos. Two were of N.E. and C.H. together, naked in the shower. Two additional photos were of C.H. wearing a lingerie top. Michelle said the lingerie top was Michelle's and she gave it to Officer

Mouwerik. Michelle also said defendant had called there sometime between Officer Mouwerik's three visits to the apartment.

Officer Mouwerik then spoke to C.H. She again told him B.L. had taken the photos but when questioned further, said defendant had taken the photos. C.H. said that when defendant took the photo of her, in which she was blindfolded, she and N.E. were playing a game in which they searched for coins blindfolded. They called this "the money game."

Officer Mouwerik also spoke to N.E. during the third visit. She initially said that B.L. took the shower pictures but later told Officer Mouwerik defendant told her to say B.L. took the pictures. She said she wanted to protect defendant and began to cry. She did not want defendant to go to jail. N.E. conceded defendant took the photos.

Four days later, on June 12, 2001, Officer Mouwerik spoke to defendant. When asked why he took the picture of C.H. wearing lingerie, defendant responded that "he was still trying to figure that one out." When asked about the photos of C.H. and N.E. naked in the shower, defendant said it was "horseplay."

A Child Protective Services (CPS) worker interviewed the girls. The CPS worker and Officer Mouwerik asked the girls if they had ever been touched inappropriately. The girls said they had not. Defendant was not arrested or charged with any crime at that time.

Six years later, in June 2007, N.E. and defendant got into a loud argument over N.E.'s clothing. N.E. wanted to wear swim-short bottoms under her skirt for her physical education (PE) class. Defendant told her he did not want her wearing such skimpy

clothing and took away N.E.'s swimsuit. Defendant yelled at N.E. and kicked her in the leg. N.E. was upset and crying when defendant dropped her off at school. N.E. told her school counselor defendant had kicked her and told her counselor defendant had been molesting her.

At trial, N.E. testified that defendant first touched her when she was around nine years old and had the chicken pox. After N.E. put lotion on to control the itching, she fell asleep on the living room couch naked, with a blanket covering her. N.E. awoke to defendant putting his hand under the blanket, touching her breasts and vaginal area. Defendant was simultaneously rubbing his penis. This incident is the basis of count 1.

N.E. told police detective Deutscher, who was assigned to investigate the molestation, that on two occasions, at the time of the chicken pox incident, defendant had touched her vaginal area while N.E. was sleeping on the couch. N.E. testified defendant had done this at least five times when she was between 10 and 14 years old. Defendant persuaded N.E. not to tell anyone. When she was 11 or 12 years old, defendant told her "You don't want your dad to go to jail right?"[3] These allegations are the basis of count 2.

About the same time defendant was molesting N.E., he was also inappropriately touching C.H. at night. C.H. testified that on one occasion, defendant rubbed her body over her clothing, from her leg up to her arm. He also rubbed her breast. She was lying in the bottom bunk bed in her room. Her sisters were sleeping in the other bunk beds. It happened in 2001, when C.H. was about 11 years old. A.L. testified that she saw

[3] CH and NE called defendant, "Dad."

defendant enter the girls' bedroom, kneel down next to C.H.'s bunk bed, lift up C.H.'s shorts, and rub her bottom as he masturbated. On another occasion, when C.H. fell asleep on the living room floor, with defendant sitting next to her, she discovered upon awaking that her underwear was missing. Defendant told her she peed on herself. Count 5 is based on these allegations.

N.E. and C.H. further testified that defendant took pictures of them in the shower, beginning when N.E. was about 10 years old and C.H. was 11. N.E. and C.H. noticed that there were video cameras hidden in the house, including in the girls' bathroom and bedroom. The bathroom camera was pointed toward the shower.

N.E. and C.H. testified that defendant played "the money game" with them. He directed them to dress in lingerie or bathing suits, and look for money blindfolded. They played this several times. Counts 3 and 4 are based on the money game allegations.

Defendant also would direct them to put on their mother's lingerie and take pictures of them posing. This continued until shortly before N.E. reported defendant's abuse to the police in 2007. When officers searched defendant's apartment, they found film and photos inside a comic book in the master bedroom. There were photos of C.H.'s and N.E.'s vaginal areas. They also found a red negligee and skirt N.E. was wearing in the photos.

After defendant was arrested and CPS removed the girls from Michelle and defendant's custody, defendant sent N.E. letters that she said made her feel bad about what had happened to defendant. N.E. attempted to recant some of her allegations.

Dr. Jody Ward, a clinical and forensic psychologist testified as an expert on Child

Sexual Abuse Accommodation Syndrome.

Defense investigator, Victor Paul, testified that about a month after N.E. reported the molestation in June 2007, he interviewed N.E. She told him defendant would not let her visit her boyfriend because he was 18 years old. N.E. told Paul that what she had told the police was incorrect. The incidents she claimed happened in 2007 did not occur. She said she wanted to clear up the inaccuracies in her original report and claimed she had lied because she was upset with defendant.

Defendant's brother, A.M., testified that after defendant's arrest, he had spoken to the girls about their allegations. N.E. told him defendant was strict with her and did not let her see her boyfriend. She also told him she had made up the abuse allegations because she was upset with defendant.

2. Information Amendment

Defendant contends the trial court erred in permitting the prosecutor to amend the information to add count 4, in violation of section 1009. Defendant claims there was no evidence of this new offense presented at the preliminary examination. Count 4 of the second amended complaint alleges that on January 1, 2001, through June 2, 2003, defendant committed a lewd act upon C.H., a child under the age of 14 years, in violation of section 288(a). Count 4 is based on the money game incident.

A. Procedural Background

A criminal complaint was filed and defendant was arraigned in June 2007, for molesting his stepdaughters, N.E. and C.H., between 2001 and 2005.

During the preliminary hearing in June 2007, police detectives Deutscher and

Kelly testified they investigated molestation allegations against defendant and interviewed N.E., C.H., A.L. and defendant. N.E. told Detective Deutscher that defendant had been molesting her and her sisters. He started molesting her when she was about nine years old. Defendant also played the money game with her and C.H.

Police Detective Kelly testified at the preliminary hearing that in the course of investigating defendant, she interviewed C.H. C.H. told Kelly that defendant played the money game with her. C.H. estimated they played the game around five times when she was between the ages of 14 and 15 years. Detectives Deutscher and Kelly also testified that N.E., C.H. and A.L. described other acts of molestation committed by defendant.

The original information was filed in June 2007. It alleged three counts of molestation upon a child under the age of 14 years (§ 288(a)), from January 10, 2003, to January 10, 2005. N.E. was the alleged victim in counts 1 and 2 and C.H. was the victim in count 3.

In December 2007, the information was amended to add a multiple victim enhancement (§ 667.61, subd. (b)).

On January 6, 2009, the prosecution filed on the eve of trial a second amended information, adding two new counts, counts 3 and 4, and renumbering count 3 as count 5. The new count 3 alleged an additional molestation offense involving N.E. and count 4 added an additional molestation offense involving C.H. The new counts contained the same general allegations as the previously alleged counts.

During a hearing on motions in limine on January 6, 2009, the prosecutor informed the court it had just filed a second amended information. The prosecutor noted

she had given defendant oral notice of the two new counts several weeks earlier. The prosecutor claimed that the facts that were the basis of the two new counts were in the preliminary hearing transcript.

In response, defense counsel objected to the second amended information on the grounds the allegations were old and stale, and it was too late to amend since jury selection was scheduled to begin that day. Defense counsel added that he would have to review the preliminary hearing transcript to confirm that there was evidence supporting the two new charges. Defense counsel complained that adding the new counts would leave defense counsel unprepared to refute them.

Over defense counsel's objection, the court permitted the second amended information and arraignment on the ground the two new counts were very similar in time to the original three counts.

B. Applicable law

The California Constitution provides that "Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information." (Cal. Const., art. I, § 14; *People v. Burnett* (1999) 71 Cal.App.4th 151, 165.) "Our Constitution thus requires that 'one may not be prosecuted in the absence of a prior determination of a magistrate or grand jury that such action is justified.' [Citation.]" (*Ibid.*)

An indictment or information may be amended by the district attorney at any time before defendant pleads, and the court may allow amendment of the accusatory pleading "for any defect or insufficiency, at any stage of the proceedings." (§ 1009; *People v.*

Burnett, supra, 71 Cal.App.4th at p. 165.) The question of whether the prosecution should be permitted to amend the information is a matter within the sound discretion of the trial court. (*People v. Winters* (1990) 221 Cal.App.3d 997, 1005 (*Winters*).) An endictment or accusation, however, ". . . cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination." (§ 1009.)

Even though in *Winters, supra,* 221 Cal.App.3d 997, there was sufficient evidence presented at trial establishing a new offense, the court reversed the conviction because there had been no evidence of the new count presented before the trial, during a preliminary hearing. In *Winters, supra,* the defendant was charged with possession for sale of methamphetamine and waived his right to a preliminary hearing. During trial, the prosecution was permitted to amend the information to add a charge of transportation of methamphetamine. The *Winters* court reversed the transportation conviction on the ground the preliminary hearing was waived and there, thus, was no evidence presented on the transportation count. (*Id.* at p. 1007.)

The *Winters* court explained: "We acknowledge that respondent's motion to amend the information to add a count for transportation of methamphetamine may have come as no surprise to appellant and would have conformed the information to the proof at trial, as respondent argues here and argued below. It seems to us that is not the point nor helpful to respondent. Section 1009 specifically proscribes amending an information to charge an offense not shown by the evidence taken at the preliminary hearing. This rule has remained virtually unchanged for over 80 years." (*Winters, supra,* 221

Cal.App.3d at p. 1007.)

C. Discussion

Defendant argues that allowing the People to amend to add count 4 violated section 1009 because there was no evidence presented at the preliminary hearing that C.H. was under the age of 14 when she played the money game. Defendant notes Detective Kelly testified at the preliminary hearing that C.H. estimated she was 14 or 15 years old when defendant played the money game with her. This was the only testimony presented at the preliminary hearing as to the age of C.H. when she played the game.

Nevertheless, there was sufficient evidence at the preliminary hearing to support count 4. Kelly testified C.H. said defendant and the girls played the money game at least five times, and C.H., N.E., and A.L. told the investigating officers defendant had molested C.H. and N.E. numerous times, in a number of different ways, when the girls were under the age of 14. There was also testimony defendant had been molesting C.H. since she was 11 years old. A reasonable inference could be made that the money game also may have occurred when C.H. was under the age of 14. The inclusion of count 4 was proper because the preliminary examination revealed that defendant had been engaging in a course of illicit conduct with his daughter over a long period of time and that the added offense was related and similar to the other alleged molestation offenses originally pled. (*People v. Bartlett* (1967) 256 Cal.App.2d 787, 790.)

In addition, there was no miscarriage of justice in adding count 4 since defendant had sufficient notice of the new count. All of the counts in the felony complaint, original information, and amended information alleged that the charged offenses were for acts of

molestation occurring when the girls were under the age of 14. The prosecutor also informed the court the day the second amended information was filed that several weeks before filing the second amended information, she had given defendant oral notice of the prosecution's intent to add the two new counts that were based on the money game. A variance between the evidence presented at trial to support a charge, and the evidence presented at the preliminary hearing to give notice of the factual basis of the charge, will not be deemed material unless the variance has prejudiced the defendant in preparing and presenting his defense. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 906.) Here, defendant has not established he was prejudiced in preparing and presenting his defense to count 4.

We thus conclude the trial court did not abuse its discretion in permitting count 4 to be added to the information. (*People v. Bolden* (1996) 44 Cal.App.4th 707, 716.)

3. Motion to Dismiss Counts 3 and 4

Defendant contends the trial court erred in denying his section 1118.1 motion to dismiss counts 3 and 4 of the second amended information. Count 3 charged defendant with committing a lewd act upon N.E., a child under the age of 14, between January 10, 2001, and January 10, 2003 (§ 288(a)). Count 4 charged defendant with committing the same crime against C.H., between January 1, 2001, and June 2, 2003. Both counts were based on defendant playing the money game with the girls. Defendant argues the court should have acquitted him of counts 3 and 4 because there was no evidence of concurrence between the prohibited act and lewd intent.

A. Procedural Background and Applicable Law

Following the close of evidence, defendant moved to dismiss counts 3 and 4[4] pursuant to section 1118.1, on the ground there was insufficient evidence of concurrence of a "touching" act and lewd intent. During the hearing on the motion for acquittal, defense counsel also argued there was no requisite touching since counts 3 and 4 were based on the theory that defendant directed N.E. and C.H. to put certain clothes on. In response, the prosecutor argued there was a touching under *People v. Austin* (1980) 111 Cal.App.3d 110 (*Austin*), in which the defendant directed the victim to remove her pants. Defense counsel argued *Austin* was distinguishable because the defendant in *Austin* was watching the victim change her clothes, whereas in the instant case, there was no evidence defendant watched the girls change their clothes. Without elaborating, the trial court denied defendant's motion for acquittal.

On a motion by defendant under section 1118.1, a trial court must "order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal." (§ 1118.1.) "The purpose of a motion under section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case." (*People v. Shirley* (1982) 31 Cal.3d 18, 70.)

The prosecution has the burden of proving every element of a crime beyond a reasonable doubt. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.) "To determine

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[4] Defense counsel erroneously refers to count 4 as count 5.

whether the prosecution has introduced sufficient evidence to meet this burden, courts apply the 'substantial evidence' test." (*Ibid.*, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578.) "The substantial evidence test applies both when an appellate court is reviewing on appeal the sufficiency of the evidence to support a conviction and when a trial court is deciding the same issue in the context of a motion for acquittal under Penal Code section 1118.1 at the close of evidence." (*People v. Cuevas*, *supra*, at p. 261.)

Here, defendant was charged in counts 3 and 4 with committing a lewd act upon a child under the age of 14, in violation of section 288(a). Former section 288(a), in effect at the time of commission of the offenses, provided that one is guilty of a section 288(a) offense when one "willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, . . . " Crimes included in former "Part 1" included rape (§ 261) and sexual assault of a child (§ 289).

A violation of section 288(a) requires "'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." (*People v. Martinez* (1995) 11 Cal.4th 434, 452 (*Martinez*).) "[T]he circumstances of the touching remain highly relevant to a section 288 violation. The trier of fact must find a union of act and sexual intent . . . and such intent must be inferred from all the circumstances beyond a reasonable doubt. A touching which might appear sexual in context because of the identity of the perpetrator, the nature of the touching, or

the absence of an innocent explanation, is more likely to produce a finding that the act was indeed committed for a sexual purpose and constituted a violation of the statute." (*Ibid.*)

Courts have held that a defendant need not touch the victim in order to violate section 288. In *Austin, supra*, 111 Cal.App.3d at pages 114-115, the court held that a defendant who, without touching the child, compelled the child to remove her own clothing was guilty of violating section 288. Violation of section 288 requires the defendant to either touch the body of a child or willfully cause a child to touch her own body, the defendant's body, or the body of someone else. (*Ibid.*)

In *People v. Mickle* (1991) 54 Cal.3d 140, 176 (*Mickle*), in which the California Supreme Court approved the holding in *Austin, supra*, 111 Cal.App.3d at pages 114-115, the court stated: "Defendant does not suggest that the actual or constructive disrobing of a child by the accused cannot constitute a lewd act as a matter of law. Where committed for a sexually exploitative purpose, such conduct is presumptively harmful and prohibited by section 288(a)." (*Mickle, supra,* 54 Cal.3d at p. 176.) A nonforcible lewd and lascivious act, which requires the intent to arouse, appeal to or gratify the defendant or the minor victim sexually (*In re Paul C.* (1990) 221 Cal.App.3d 43, 54), is harmful and offensive because of the "special protection" the law provides for children from sexual exploitation. (See *Martinez, supra,* 11 Cal.4th at p. 443; *Austin, supra,* 111 Cal.App. 3d at pp. 114, 115.)

B. Discussion

Defendant argues there was insufficient evidence of the count 3 and 4 offenses

because defendant did not touch the girls, he was not present when they changed their clothes, and there was no evidence he harbored any lewd intent when the girls touched themselves while changing their clothes. Defendant notes there was no evidence as to how long the girls took to change their clothes after defendant asked them to do so. Defendant asserts that, although he may have experienced sexual gratification when he observed the girls search for money during the money game, there was no evidence he experienced sexual gratification while the girls were changing their clothes. Thus, the requisite concurrence of act and intent is lacking.

The People construe the touching element broadly to encompass a constructive touching, which occurs out of the presence of the defendant. The People argue the requisite concurrence of the touching and lewd intent occurred over the course of defendant directing the girls to change their clothes, the girls putting on the provocative clothing he provided, and defendant then watching and taking photos of the blindfolded girls searching for money.

Defendant argues that it is not sufficient for defendant's lewd intent to occur in some proximity to the touching act. The act and lewd intent must occur simultaneously. Defendant rejects the constructive touching doctrine and further asserts that, even if it is a valid principle, it is not controlling in the instant case because it was not concurrent with a lewd intent. Defendant claims the prosecution's theory based on defendant directing the girls to change into provocative clothing essentially criminalizes thoughts instead of actions.

We conclude that, under the totality of the circumstances, the evidence supported a reasonable finding that there was a touching concurrent with lewd intent, in violation of section 288(a). The evidence established that the touching occurred when, at defendant's direction, the girls removed their clothing and dressed in clothing defendant told them to wear. (*Austin, supra,* 111 Cal.App.3d at pp. 114, 115.) This act of changing clothing was sexually motivated by defendant's lascivious desire to observe and take pictures of the girls in provocative clothing while they played the money game.

We recognize that it is undisputed defendant did not touch the girls when they removed their clothing and dressed in the provocative clothing. But under *Austin, supra,* 111 Cal.App.3d 110, the court held that a "touching" under section 288 need not be committed directly by the defendant. In *Austin,* the court held that a defendant who, without touching the child, compelled the child to remove her own clothing was guilty of violating section 288. (*Austin, supra,* at p. 115; see also *People v. Meacham* (1984) 152 Cal.App.3d 142, 153-154.)

Defendant acknowledges this principle but argues it is inapplicable in the instant case because defendant was not present when the girls changed their clothing and thus did not observe the girls touching themselves as they changed. There thus was no concurrence of the act and the defendant's lewd intent. There does not appear to be any case law addressing the issue of whether a touching out of the presence of the defendant can satisfy the touching element within the meaning of section 288. This is thus an issue of first impression.

In addressing this issue, we look to our high court's discussion of section 288 in *Martinez, supra,* 11 Cal.4th 434, in which the defendant was convicted of committing a lewd act with force when he grabbed a young girl, hugged her, and touched her chest area. (*Id.* at p. 441.) In discussing the meaning of a "lewd" act within the meaning of section 288, the court in *Martinez* stated: "[A] 'lewd or lascivious act' is defined expansively to include contact 'upon or with the [victim's] body, or any part or member thereof.' (§ 288, subd. (a).) Nothing in this language restricts the manner in which such contact can occur or requires that specific or intimate body parts be touched. Rather, a touching of 'any part' of the victim's body is specifically prohibited." (*Id.* at p. 442.) This definition would encompass any touching committed while a victim disrobed or changed his or her clothes.

The court in *Martinez, supra,* 11 Cal.4th 434 explained that the touching element is extremely broad. Section 288 is unlike other felony sex statutes which describe the criminal act in precise and clinical terms. (*Id.* at p. 443.) The *Martinez* court concluded that it must be assumed that "the absence of similar language in section 288 was deliberate, and that the statute was intended to include sexually motivated conduct not made criminal elsewhere in the scheme." (*Ibid.*)

The purpose of section 288 is to protect children from being sexually exploited: "The Legislature's decision to cast a prohibited lewd act in such general terms is consistent with the basic purpose of the statute as long described by the courts. As we have explained, section 288 was enacted to provide children with 'special protection' from sexual exploitation. [Citation.] The statute recognizes that children are 'uniquely

susceptible' to such abuse as a result of their dependence upon adults, smaller size, and relative naivet[é]. [Citation.] The statute also assumes that young victims suffer profound harm whenever they are perceived and used as objects of sexual desire. [Citation.] It seems clear that such concerns cannot be satisfied unless the kinds of sexual misconduct that result in criminal liability are greatly expanded where children are concerned." (*Martinez, supra,* 11 Cal.4th at pp. 443-444.)

Based on this legislative intent, "the courts have long indicated that section 288 prohibits *all* forms of sexually motivated contact with an underage child. Indeed, the 'gist' of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act. [Citation.] '[T]he purpose of the perpetrator in touching the child is the controlling factor and each case is to be examined in the light of the intent with which the act was done. . . . If [the] intent of the act, *although it may have the outward appearance of innocence,* is to arouse . . . the lust, the passion or the sexual desire of the perpetrator [or the child,] it stands condemned by the statute . . . .' [Citation]." (*Martinez, supra,* 11 Cal.4th at p. 444.)

In the instant case, there is overwhelming evidence that defendant was sexually exploiting N.E. and C.H. when he directed them to dress in provocative clothing and then play the money game. The question here is whether there was sufficient evidence of a touching concurrent with lewd intent, where the girls dressed themselves out of defendant's presence but under defendant's direction, for the sexually motivated purpose of playing the money game. As noted by our high court in *Martinez, supra,* 11 Cal.4th at page 444, "throughout the statute's history, the cases have made clear that a 'touching' of

the victim is required, and that sexual gratification must be presently intended at the time such 'touching' occurs. [Citations.] However, the form, manner, or nature of the offending act is not otherwise restricted. Conviction under the statute has never depended upon contact with the bare skin or 'private parts' of the defendant or the victim. [Citations.] Stated differently, a lewd or lascivious act can occur through the victim's clothing and can involve 'any part' of the victim's body. [Citations.]"

The *Martinez* court further clarified that "*any* touching of an underage child is 'lewd or lascivious' within the meaning of section 288 where it is committed for the purpose of sexual arousal." (*Martinez, supra,* 11 Cal.4th at p. 445.) The court added, "the touching of an underage child is 'lewd or lascivious' and 'lewdly' performed depending entirely upon the sexual motivation and intent with which it is committed." (*Id.* at p. 449.) And "the only way to determine whether a particular touching is permitted or prohibited is by reference to the actor's intent as inferred from all the circumstances." (*Id.* at p. 450.) Such circumstances to be considered by the fact finder, include "the relationship of the parties, the nature of the touching, and the presence or absence of any nonsexual purpose under section 288." (*Ibid.*)

Under *Martinez* and *Austin*, section 288 is violated by "any touching" of an underage child, including a constructive touching by the victim at the defendant's direction, "accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." (*Martinez, supra,* 11 Cal.4th at p. 452.)

Because of the apparent legislative intent to apply section 288 expansively to any sexually motivated touching, including touchings by the victim at the defendant's

direction, we conclude section 288 encompasses the defendant's act in the instant case, of directing the victims to change into provocative clothing for the sexually motivated purpose of watching the girls search for money in the provocative clothing. The defendant committed the touching acts, constructively, through the victims as conduits for the purpose of sexual arousal. Even though defendant may not have experienced sexual arousal at the moment the victims touched themselves when putting on the provocative clothing, defendant's intent when instigating or causing the touchings was lewd and lascivious within the meaning of section 288, since the touchings were sexually motivated and committed for the purpose of defendant's sexual gratification.

Furthermore, the touching, consisting of the girls changing into provocative clothing, was not, as defendant argues, merely incidental to the lewd and lascivious money game. It was an integral part of defendant's lewd scheme of experiencing sexual arousal from watching the girls searching for money blindfolded while scantily clad in bras and underwear or bathing suits. A jury could reasonably find the acts of the girls putting on provocative clothing at defendant's direction constituted touchings within the meaning of section 288(a), which defendant directed with lewd intent, in furtherance of a sexually motivated scheme, and for the purpose of exploiting the girls sexually, in violation of section 288(a).

4. Jury Instruction on the Section 288 Offenses

Defendant contends the trial court committed instructional error as to counts 3 and 4 by failing to instruct the jury that a section 288(a) conviction requires actual concurrence between the prohibited touching and the defendant's lewd intent.

The trial court instructed the jury on the section 288(a) offense by giving the following standard jury instruction, CALCRIM No. 1110:

"To prove that the defendant is guilty of this crime, the People must prove that:

"1A. The defendant willfully touched any part of a child's body either on the bare skin or through the clothing; or

"1B. The defendant willfully caused a child to touch her own body, the defendant's body, or the body of someone else, either on the bare skin or through the clothing;

"2. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child;

"and

"3. The child was under the age of 14 years at the time of the act.

"The touching need not be done in a lewd or sexual manner.

"Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

"Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required." (CALCRIM No. 1110.)

Defendant did not object in the trial court to this instruction or request further instruction on the offense. Defendant raises for the first time on appeal his contention that the instruction was deficient. Regardless of whether defendant waived this objection by not raising it in the trial court, we reject the contention on the merits.

A. Standard of Review

Even in the absence of a request, the trial court must instruct the jury on the applicable "'general principles of law relevant to the issues raised by the evidence.' [Citation.] Therefore, a claim that a court failed to properly instruct on the applicable principles of law is reviewed de novo. [Citation.] In conducting this review, we first ascertain the relevant law and then 'determine the meaning of the instructions in this regard.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111, quoting *People v. Kelly* (1992) 1 Cal.4th 495, 525.)

In determining whether the trial court erred in instructing the jury, """we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]"' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin, supra,* 78 Cal.App.4th at pp. 1111-1112.)

B. Discussion

Defendant argues the language of CALCRIM No. 1110 is deficient in failing to instruct the jury to determine whether the defendant's lewd intent was concurrent with the touching act. Defendant claims the instruction merely required an act and an intent but failed to set any parameters on the degree of proximity between the act and intent. The court in *Mickle, supra,* 54 Cal.3d 140, essentially rejected this argument.

In *Mickle*, the court stated: "Defendant's main complaint is that, by using 'and' rather than 'with' to define the necessary relation between act and intent, the *Austin*

instruction, as given, might have misled jurors to believe that the sexual intent could have been focused solely on 'some future unrealized act.' However, no reasonable jury would adopt this construction. It was manifest from the special instruction itself that the constructive disrobing and sexual intent must coincide in order for a crime to occur. The instructions also indicated in at least three other places that a physical touching accomplished 'with' such intent violates section 288(a). Contrary to what defendant argues, this language fully informed the jury that defendant could not be convicted on a 'disrobing' theory unless he intended to give or receive immediate sexual gratification from that activity. No error occurred." (*Mickle, supra*, 54 Cal.3d at p. 176.)

Similarly, in the instant case, the trial court instructed the jury that the "touching" had to be accomplished "with" the requisite lewd intent. The court instructed the jury in relevant part: "The defendant willfully caused a child to touch her own body, the defendant's body, or the body of someone else, either on the bare skin or through the clothing; [¶] 2, The *defendant committed the act with the intent* of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child . . . ." (CALCRIM No. 1110; italics added.) This instruction sufficiently conveyed to the jury the requisite finding of concurrence of the touching act and lewd intent.

Furthermore, the trial court reiterated this principle when giving CALCRIM No. 251, in which the court instructed the jury: "The crimes charged in this case require the proof of the union, or joint operation, of act or wrongful intent. [¶] For you to find a person guilty of the crimes of Lewd Act Upon a Child as charged in Counts 1 through 5, that person must not only intentionally commit the prohibited act, but must also do so

with a specific intent and/or mental state. The act and the specific intent and/or mental state required are explained in the instruction for the crime."

Based on the instructions as a whole and assuming the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given, we conclude the trial court adequately instructed the jury as to counts 3 and 4 on a section 288(a) offense. (*People v. Martin, supra,* 78 Cal.App.4th at pp. 1111-1112.)

5. Cross-Examination of N.E.

Defendant contends that the trial court violated his Sixth Amendment right to cross-examine N.E. by precluding defense counsel from cross-examining N.E. regarding her pregnancy and suicide attempt occurring after defendant's arrest. Defendant asserts he was prevented from exposing N.E.'s bias and motive to accuse defendant falsely of the charged offenses. We disagree.

A. Background

Following defendant's arrest for the charged offenses, CPS placed N.E. with M.C. and his mother. M.C. was N.E.'s boyfriend. After being placed in M.C.'s home, N.E. became pregnant.

The prosecutor moved in limine to exclude cross-examination regarding N.E.'s sexual history, particularly her pregnancy. In response, defense counsel argued N.E.'s pregnancy was relevant to show that N.E. falsely accused defendant of the charged crimes in order to be with her boyfriend, M.C., whom defendant had refused to allow N.E. to see. The court responded that N.E.'s credibility and ulterior motives could be established without bringing in evidence of N.E.'s pregnancy. The court stated it would

allow evidence of N.E.'s subsequent living conditions but would not allow any mention of her pregnancy.

Defense counsel also requested that he be permitted to cross-examine N.E. regarding her suicide attempt committed a few months after she reported defendant's molestation. The trial court rejected the request, explaining that the link between the suicide attempt and N.E.'s state of mind when she made the allegations was "tenuous at best," particularly since there could have been many other reasons why she attempted suicide. The court concluded any probative value was outweighed by the prejudicial nature of such testimony.

B. Standard of Review

The standard of review is abuse of discretion. "Under the Sixth Amendment of the United States Constitution, a defendant has the constitutional right to confront the witnesses against him and to cross-examine his accusers. A criminal defendant states a violation of the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show bias on the part of the witness, and thereby to expose facts from which the jury could appropriately draw inferences relating to the reliability of the witness. [Citations.] [¶] Nevertheless, a trial court retains broad discretion over the conduct of trial. In the context of its duty to supervise the questioning of trial witnesses, it has wide discretion to limit questions that are marginally relevant and cumulative. Although the exposure through cross-examination of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of confrontation, the confrontation clause does not

prevent a trial court from imposing reasonable limits on a defense counsel's inquiry into the potential bias of a prosecution witness. [Citation.] 'On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' [Citations.] . . . [¶] The confrontation clause simply guarantees an *opportunity* for effective cross-examination; it does not assure a chance to cross-examine in whatever way, and to whatever extent, the defense might wish. [Citations.] . . . Thus, a trial court's exercise of discretion to exclude evidence does not implicate or infringe a defendant's federal constitutional right to confront the witnesses against him, unless the prohibited cross-examination might reasonably have produced a significantly different impression of the witness's credibility. [Citations.]" (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1385-1386.)

C. Discussion

The trial court did not abuse its discretion in precluding defense counsel from cross-examining N.E. regarding her pregnancy and suicide attempt. The court imposed reasonable limits on defense counsel's cross-examination. Cross-examination regarding N.E.'s pregnancy and suicide had marginal relevance, if any, to N.E.'s overall credibility and motivation to report defendant's crimes.

Furthermore, cross-examination concerning her motivation to implicate defendant because of his interference with her relationship with M.C. was established through other evidence. N.E. testified that within two months before she reported defendant's crimes in

June 2007, she had a boyfriend she was dating and she wanted to talk to him on the telephone but defendant would not let her because her boyfriend was 18 years old and N.E. was only 15 and a half years old.

C.H. similarly testified at trial that M.C. was N.E.'s boyfriend in 2007, and defendant would not let N.E. or C.H. see boys. C.H. stated that N.E. got into loud arguments with defendant over this.

N.E. also testified that right after she had a fight with defendant and she reported that defendant was molesting her, the CPS placed her in M.C.'s mother's home, at N.E.'s request. N.E. denied during her trial testimony that, when she reported that defendant had molested her, she had lied so that defendant would leave her home. N.E. also acknowledged she had previously told an investigator that she had lied, but claimed at trial that she was telling the truth about defendant molesting her. She denied she made up the molestation because she wanted to see M.C.

Defense counsel had ample opportunity to cross-examine N.E. on whether she falsely accused defendant of molestation because defendant had prevented her from seeing her boyfriend. In addition, there was testimony at trial that N.E. told defendant's brother, A.M., she had lied about the molestation in order to see M.C.

Cross-examination regarding N.E.'s pregnancy and suicide attempt was of little, if any, probative value and would have provided duplicative and irrelevant evidence. As noted in *People v. Ayala* (2000) 23 Cal.4th 225, 301 (*Ayala*), "'not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting

cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance.' [Citation.] The constitutional claim is without merit."

We conclude the trial court did not commit prejudicial error by precluding defense counsel from cross-examining N.E. on her pregnancy and suicide attempt.

6. Disposition

The judgment is hereby modified so as to award defendant 647 actual days of custody credit, plus 97 days work time credit, minus 180 days custody for count 1 misdemeanor battery (§ 242), for a **total of 564 days of credit**, rather than 324 days. The trial court is directed to amend the abstract of judgment so as to reflect the modifications and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. (§§ 1213, 1216.) In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

s/Hollenhorst
J.

We concur:

s/Ramirez
P. J.

s/King
J.